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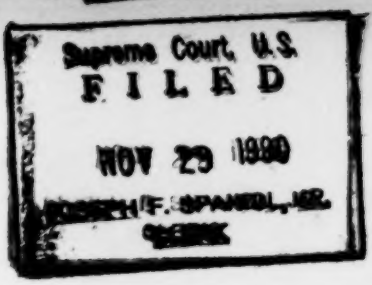

No. _____

In The

Supreme Court of the United States

October Term, 1990

JOHNNY LEE ASHER,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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November 26, 1990

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QUESTIONS PRESENTED FOR REVIEW

I.

The inventory search of petitioner's pickup truck violated the Fourth Amendment because the police department that conducted it lacked a standardized inventory procedure contrary to this Court's decisions in *Colorado v. Bertine* and *Florida v. Wells.*

II.

The inventory search of petitioner's pickup truck was a pretext for a general search in violation of the Fourth Amendment.

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In The

Supreme Court of the United States

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JOHNNY LEE ASHER,
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STATE OF ARKANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

OPINION BELOW

The opinion of the Arkansas Supreme Court was rendered on September 10, 1990. It is reported as *Asher v. State,* 303 Ark. 202, 795 S.W.2d 350 (1990).

JURISDICTION

The Arkansas Supreme Court decided this case on September 10, 1990. Petitioner's petition for rehearing

was denied on October 8, 1990. This Petition for Writ of Certiorari is filed within sixty days and is, therefore, timely.

The Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the U.S. Constitution provides in § 1 that:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law, ...

STATE RULES INVOLVED

Rule 12.6(b) of the Arkansas Rules of Criminal Procedure provides as follows:

> A vehicle impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to the extent as is reasonably necessary for safekeeping of the vehicle and its contents.

STATEMENT OF THE CASE

A. *The Proceedings Below*

On January 18, 1988, the petitioner was driving his pickup truck in Siloam Springs, Arkansas when he suffered an epileptic seizure and had a single vehicle accident. A witness to the accident called for an ambulance, and he went to see about petitioner who was semi-conscious and bleeding from a head laceration. Paramedics arrived before the police. Petitioner was taken to the hospital by ambulance.

The police conducted their routine traffic accident investigation procedures and called for a tow truck to remove petitioner's vehicle. Before the tow truck arrived, the officers conducted what they described as an inventory search of the vehicle. The search produced a prescription pill bottle which contained two baggies which had a brownish powder in them. They also found a third baggie with a white powder. The officers also found a handgun and a shotgun. At the time of the "inventory," the officers admitted that they had no probable cause to believe that any laws had been violated. Later, detectives determined that the substances in the baggies were controlled substances and that petitioner was a felon who was legally incapable of possessing the firearms.

Petitioner was charged with two counts of possession of a controlled substance with intent to deliver (methamphetamine and amphetamine); Ark. Code Ann. § 5-65-103 (1987) and two counts of being a felon in possession of a firearm. *Id.*, § 5-73-103 (1987). His pretrial motion to suppress the inventory search was heard and denied. At trial in July 1989, he was convicted by a jury and sentenced by the jury to 42 years imprisonment and a $40,000

fine. He was permitted to remain free on bond pending appeal to the Arkansas Supreme Court.

On appeal to the Arkansas Supreme Court, petitioner challenged the inventory search on two grounds: First, appellant argued that the search was not conducted as a valid inventory as contemplated by Ark.R.Crim.P. 12.6 (b) and the Fourth Amendment. Second, appellant argued that the search of containers during the inventory search was unreasonable under the inventory exception to the Fourth Amendment. Appellant's Brief at 52-61; Appellee's Brief at 1-4.[1]

The Arkansas court's entire discussion of this issue, after reciting the facts, was as follows:

> With regard to point one -- the search of the vehicle -- the record clearly establishes that the appellant was removed from the scene in a semi-conscious state and that his condition was such that the officers made no attempt to talk to him at that time. The vehicle was removed from the accident site to be placed in the custody of the police or third parties. It is imperative under such circumstances that an inventory search be made to protect the owner's property and to insure against claims of lost, stolen, or vandalized property. The United States Supreme Court has recognized that these interests may be found to outweigh the individual's Fourth Amendment interests requiring a warrant prior to search. *Colorado v. Bertine*, 479 U.S. 367 (1987).

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[1] These briefs, of course, were filed in the Arkansas Supreme Court. In light of the decision in *Florida v. Wells, infra*, this latter point is not pressed in this Court.

> The facts here are somewhat analogous to those in *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), where the appellant was taken from the scene to a hospital following a gun battle with the police. In those circumstances we held that the search of Snell's vehicle was a proper inventory search.
>
> We hold that in this instance the search of the appellant's vehicle was a proper inventory search authorized by A.R.Cr.P. 12.6(b).

Asher v. State, supra, 303 Ark. at 203-04, 795 S.W.2d at 351.[2]

The judgment accordingly was affirmed.

Petitioner filed his petition for rehearing, and it was denied on October 8, 1990.[3]

B. *The Facts Surrounding the Inventory Search*

1. *Their "Standardized Procedure."* The testimony of the officers in this case self-servingly, conclusorily, and without any evidentiary basis, states that they operate

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[2] Petitioner submits that reliance on *Snell v. State* is totally misplaced. In that case, the defendant jumped from his vehicle firing a weapon at officers. *Id.*, 721 S.W.2d at 632-33. There clearly was probable cause for searching Snell's vehicle. The Arkansas court gratuitously offered that the search could have also been sustained as an inventory, without giving any valid legal justification.

[3] Petitioner filed on October 17, 1990, a motion to recall the mandate in the Arkansas Supreme Court. After it had not been acted on for two decision days, petitioner filed an application for bail pending certiorari with this Court. Justice Blackmun denied the bail application on October 31, 1990. The Arkansas Supreme Court denied the motion to recall the mandate on November 5, 1990.

under a "standardized procedure" (T.86, 112 (Off. Wind), T. 119 (Off. McElrea)).[4] When pressed for details of this "standardized procedure," one of the officers admitted that there actually was "no standardized procedure" for conducting the inventory. T.133-34 (Off. McElrea). Furthermore, the other officer admitted that this "standardized procedure," purportedly to protect the assets of the owner and the police and wrecker company from false claims, permits the officers the discretion to omit reference to the make, model, or serial numbers of some of the items in the vehicle. *See, e.g.*, T. 93.[5]

2. *Evidence of Pretext.* Without specifying make, model, and serial number of things seized in their purported inventory, the officers are telegraphing their true purpose: The inventory was a pretext to conduct a general search of petitioner's belongings. In fact, the officer conducting this purported inventory admitted that it could be considered to not be complete. *Id.* at 95.[6] *See also* T. 133 (Off. McElrea) (inventory did not even show where items were found in the vehicle). In addition, the "standardized procedure" still leaves a great amount of discretion in the officer. *Id.* at 99. Finally, to underscore the

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[4] The rote testimony of the officers even included that it was "standardized procedure" to inventory the vehicle before checking on the driver's condition when the driver is taken to the hospital. *Id.*

[5] An item could be worth $10 or $500. The officers admitted that they made it possible for property to be switched. (T.213-14)

[6] Actually, the officer testified that whether or not the inventory was "complete" was a matter of "interpretation," but he felt that the inventory was "complete" for his purposes. *Id.* at 95.

officers' real motive in conducting this purported inventory, one officer admitted that he turned over the evidence taken from the vehicle during the inventory search to the Criminal Investigation Division of the Siloam Springs Police Department without even having any probable cause to believe that a crime had occurred. *Id.* at 105, 109.[7]

Here, the officers repeatedly admitted to the exercise of their discretion in the conduct of the so-called inventory by: (1) omitting items from the inventory, (2) failing to note where things were found in the vehicle (T.133,212), (3) failing to record serial numbers of valuable property (except for a gun actually removed) which admittedly could permit persons to exchange property worth less for what was in the inventoried vehicle (T.93,213-14) even though the purpose of the inventory is to protect the tow truck operator (T. 228), (4) failing to note that a prescription bottle with petitioner's name on it was in the truck (T.136), (5) failing to note the amount of change found (T.213), and (6) how they turned over the evidence seized to the detectives "for safekeeping" even though there was no evidence of crime that they could see. (T. 105,109,209) In fact, the inventory sheet put into evidence only refers to that which was removed from the vehicle. (T.511) Finally, there was no finding by the trial court that the inventory was conducted according to a standardized procedure. The trial court simply sustained the search as an inventory. (T.141-42).

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[7] The trial court found this inquiry irrelevant and prohibited defense counsel from further developing the issue. *Id.* at 110.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH *COLORADO v. BERTINE* AND *FLORIDA v. WELLS.*

A. *The police department conducting this search lacked any standardized inventory procedures.*

The last two inventory search cases of this Court make it clear that inventory searches cannot occur unless there is standardized criteria governing whether, when, and how they shall occur. The facts of this case demonstrate that there were no standardized procedures here at all; the officers operated on their own discretion as to whether, when, and how an inventory would occur.

In *Illinois v. Lafayette,* 462 U.S. 640 (1983), the Court repeatedly stressed that a jailhouse search of belongings that was, as described by the Court, a part of "routine administrative procedure" (*id.* at 643), an "incidental administrative step" (*id.* at 644),[8] "a standardized procedure for making a list or inventory" (*id.* at 645), and "standardized inventory procedures" (*id.* at 647).

In *Colorado v. Bertine,* 479 U.S. 367 (1987), the Court reaffirmed that standardized procedures are required. *Bertine* involved a city ordinance that authorized impoundment of vehicles; *id.* at 368 n.1; and "local police procedures which required a detailed inspection and inven-

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[8] Also referred to as "routine jail administration." *Id.*

tory of impounded vehicles." *Id.* at 369. The Court relied heavily on the findings of the trial court that there apparently were procedures to be followed by the officers. *Id.* at 374 n.6.

> Nothing in [*South Dakota v.*] *Opperman* [, 428 U.S. 364 (1976)] or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of somthing other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.

Id. at 375-76 (bracketed material added and footnote omitted).[9] Furthermore, "[i]n the present case, as in *Opperman* and *Lafayette*, there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." *Id.* at 372. In addition, the Court stressed that "[k]nowledge of the *precise nature* of the property helped guard against claims of theft, vandalism, or negligence." *Id.* at 373 (emphasis added).

This was reaffirmed by this Court, before the deci-

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[9] The omitted footnote (number 7) discusses the procedures that controlled the officer's discretion to conduct an inventory search.

sion was rendered below,[10] in *Florida v. Wells,* 110 S.Ct. 1632, 1635 (1990):

> Our view that standardized criteria, *ibid.*, or established routine, *Illinois v. Lafayette,* 462 U.S. 640, 648, 103 S.Ct. 2605, 2620, 77 L.Ed.2d 65 (1983), must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into "a purposeful and general means of discovering evidence of crime," *Burtine, supra,* 479 U.S., at 376, 107 S.Ct., at 744 (BLACKMUN, J., concurring).

This Court affirmed the decision of the Florida Supreme Court that, absent proof of an inventory policy that vitiates the officer's discretion to search, the inventory search was invalid. *Id.*[11]

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[10] As stated above, this case was decided below on September 10, 1990. Petitioner's brief was filed in the Arkansas Court on May 1, 1990. *Florida v. Wells, infra,* was decided on April 18, 1990.

[11] The Florida court stated that the absence of a policy was crucial to its decision because the lack of a policy gave the officers total discretion as to how and when an inventory would be conducted. *State v. Wells,* 539 So.2d 464, 468-69 (Fla.1989). While this Court disagreed with the "all or nothing" approach taken by the Florida court, all members of the Court did agree with this part of the holding. *Florida v. Wells, supra,* at 1635 (majority opinion), 1635 (BRENNAN, J., concurring), 1638-39 (BLACKMUN, J., concurring), and 1639

This inventory search fails under *Bertine* and *Wells*: (1) the standardized procedure is, at best, an oral history that has no departmental sanction that can be manipulated at will; (2) a detailed inventory is totally lacking because the "precise nature" of all the property (as required by *Bertine, supra*, at 373) was not recorded; and (3) the evidence of how the search was conducted indicates that it was a "ruse for a general rummaging" and the officers were "allowed so much latitude that [the] inventory search[] [was] turned into 'a purposeful and general means of discovering evidence of a crime.'" *Wells, supra,* at 1635, quoting *Bertine, supra*, at 376 (bracketed material added).

This inventory search was rife with discretion as to how it was conducted. Ark.R.Crim.P. 12.6(b) is construed in an manner that violates the Fourth Amendment because standardized procedures are not required. Thus, the holding below is contrary to both *Bertine* and *Wells*, and certiorari should be granted to review it.

B. *The inventory search in this case was a pretext for a general search.*

The record in this case amply demonstrates that this search was nothing more than a general search in inventory clothing. The officers' testimony about "standardized procedure" is nothing more than apparent institutional word of mouth that permits the officer to do or not do as he pleases during the search. Reading the record leaves one with the unmistakable impression that the officers'

(STEVENS, J., concurring).

recitations as to "procedures" are merely designed to overcome constitutional objections without providing any substance.

What we have here is an unreasonable general search -- no more and no less.

> The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order "'to safeguard the privacy and security of individuals against arbitrary invasions . . . .'" *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978), quoting *Camera v. Municipal Court*, 387 U.S. 523, 528 (1967). Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field," *Camera v. Muncipal Court*, 387 U.S., at 532. See *id.*, at 534-535; *Marshall v. Barlow's, Inc., supra*, 436 U.S. at 320-21; . . . . (footnotes and citations omitted).

Delaware v. Prouse, 440 U.S. 648, 653-55 (1979). The objective standards of *Bertine* and *Wells* guarantee Fourth Amendment reasonableness. The decision below guarantees official arbitrariness, and certiorari should be granted to review it.

II.

THERE ARE CONFLICTING DECISIONS AS TO WHETHER A WRITTEN POLICY MUST BE PROVED TO SATISFY *BERTINE* AND *WELLS*.

The cases which have been directly presented with the question of whether a written policy is required to limit the officer's discretion in the field have split on the question.

1. *Oral Policies Permissible.* Cases holding that oral policies are permissible if they are standardized under *Bertine* and *Wells* are as follows: *United States v. Frank*, 864 F.2d 992, 1103 (3d Cir.1989), *cert.den.* 109 S.Ct. 2442, *later appeal* 898 F.2d 140 (3d Cir.), *later appeal* 898 F.2d 143 (3d Cir.), *cert.den.* 110 S.Ct. 3292; *United States v. Kordosky*, 878 F.2d 991, 993 (7th Cir.1989), *vacated* 110 S.Ct. 1943 (1990), *on remand* 909 F.2d 219 (7th Cir.1990); *People v. Steeley*, 210 Cal.App.3d 887, 258 Cal.Rptr. 699. 700 (5th Dist.1989); *State v. Nelson*, 17 Conn.App. 556, 555 A.2d 426, 434 (1989); *State v. Weide*, 155 Wis.2d 537, 455 N.W.2d 899, 905 (Wis. 1990).

It is important to note that this Court vacated the decisions in *Kordosky* and *United States v. Hill*, 878 F.2d 6th Cir.1989), *vacated* 110 S.Ct. 1943 (1990), for recon-

sideration in light of *Wells*.

2. *Written Policies Required.* Cases holding that written policies are required are as follows: *Ex Parte Boyd*, 542 So.2d 1276, 1282-83 (Ala.1989), *cert.den.* 110 S.Ct 219; *Diaz v. State*, 555 So.2d 1306, 1307 (Fla.App. (4th Dist.) 1990); *State v. Wells, supra; People v. Binder*, 180 Ill.App.3d 624, 129 Ill.Dec. 534, 536 N.E.2d 218, 221 (4th Dist.1989); *Commonwealth v. Bishop*, 402 Mass. 449, 451, 523 N.E.2d 779, 780 (1988); *State v. Shamblin*, 763 P.2d 425, 427 (Utah App.1989). *See United States v. Judge*, 846 F.2d 274, 276 (5th Cir.1988) (court refused to take judicial notice of DEA manual re inventory searches), *appeal after remand*, 864 F.2d 1144 (5th Cir.1989) (search sustained on basis of manual), *reh. den., en banc* 868 F.2d 127, *cert.den.* 110 S.Ct. 1946 (1990); *State v. Donohoe*, 770 S.W. 2d 252, 259 (Mo.App.1989) (no procedures put in record).

In affirming *Wells*, this Court certainly has left the implication that a written policy is required. *Florida v. Wells, supra.*

3. *Written Policies Put in Record.* Several cases involve written policies that were placed in the record. *United States v. Wanless*, 882 F.2d 1459, 1463 (9th Cir. 1989) (Washington State Trooper's Manual in record); *United States v. Johnson*, 815 F.2d 309, 314 n.6 (5th Cir.1987), *cert.denied* 484 U.S. 1068 (1988) (secret service manual in record); *United States v. Judge, supra*, 864 F.2d 1144 (DEA manual); *United States v. Valerde*, 903 F.2d 1163, 1165 (7th Cir.1990) (written policy in record); *United States v. Davis*, 882 F.2d 1334, 1338-39 (8th Cir. 1989) (regulations referred to).

4. In light of the remands in *Kordosky* and *Hill*,

this court should either grant certiorari to resolve this conflict of authorities or vacate and ramand this case to the Arkansas Supreme Court for reconsideration in light of *Wells*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 26, 1990

APPENDIX

Asher v. State, 303 Ark. 202,
795 S.W.2d 350 (1990)

Johnny Lee ASHER *v.* STATE of Arkansas

CR 90-60

Supreme Court of Arkansas
Opinion delivered September 10, 1990

1. SEARCH & SEIZURE — INVENTORY SEARCH AUTHORIZED WHERE OWNER SEMI-CONSCIOUS AFTER ACCIDENT AND VEHICLE IS TO BE REMOVED. — The inventory search of appellant's vehicle was authorized by A.R.Cr.P. Rule 12.6(b) where appellant was removed from the scene of the accident in a semi-conscious state and the vehicle was to be removed from the accident site to be placed in the custody of the police or third parties.
2. EVIDENCE — REBUTTAL WITNESS NEED NOT BE DISCLOSED IN RESPONSE TO DISCOVERY REQUESTS — REBUTTAL EVIDENCE NOT PRECLUDED BY FACT IT COULD HAVE BEEN INTRODUCED DURING CASE-IN-CHIEF. — Where the state proved the weapons were found in appellant's possession by virtue of the fact they were in his truck, and the appellant asserted a lack of knowledge of the presence of the weapons, it was then proper rebuttal for the state to counter with testimony that the handgun was in plain view, regardless of the fact that the rebuttal witness had not been disclosed to the defense during discovery, and regardless of the fact that the information could have been introduced during the state's case-in-chief.
3. APPEAL & ERROR — ISSUE NOT PRESERVED FOR APPEAL — OBJECTION WAS NOT TIMELY. — Appellant's wife was asked two impermissible questions about criminal activity that allegedly occurred after the incident giving rise to the pending charges, but objections were not raised until after both questions had been asked and answered, the issue was not preserved for appeal since the objection was not raised before the first question was answered.
4. TRIAL — ISOLATED, IMPERMISSIBLE QUESTION, THOUGH TECHNICALLY ERROR, DOES NOT NECESSARILY DICTATE A REVERSAL. — Though it was technically error to ask appellant's wife about criminal activity that allegedly occurred after the incident giving rise to the pending charges, where she answered both questions negatively, appellant was not prejudiced and the fairness of his trial was not affected.

Appeal from Benton Circuit Court; *Tom J. Keith*, Judge; affirmed.

Jennifer Morris Horan; for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder*, Asst. Att'y Gen., for appellee.

OTIS H. TURNER, Justice. While operating a pick-up truck, the appellant suffered an epileptic seizure resulting in a single-vehicle accident. An employee of a nearby business witnessed the event and, after arranging for an ambulance, went to the vehicle to assist the appellant, who was semi-conscious and bleeding from a severe head laceration.

Emergency medical personnel were at the scene when two police officers arrived. The appellant, who was in need of medical attention, was removed from the truck and taken by ambulance to the hospital.

The police officers conducted routine traffic-accident procedures and called a tow truck to remove the vehicle. Prior to the arrival of the tow truck, the officers conducted an inventory search of items located in the appellant's vehicle. In the course of the inventory, they found a plastic pill bottle stuffed with two baggies containing a brownish powder and a third baggie containing a white powder. Tests subsequently revealed the contents to be controlled substances. The officers also discovered a handgun and a shotgun in the vehicle. It was later determined that the appellant was a felon.

The appellant was charged with two counts of illegally possessing a firearm and two counts of possession of a controlled substance with intent to deliver. At trial, he was convicted, and the trial court followed the jury's recommendation of a sentence totaling 42 years imprisonment and a $40,000 fine.

For reversal, the appellant asserts three errors: first, that the search of the appellant's truck was accomplished illegally; second, that a previously undisclosed state's witness, Linda Kaiser, was improperly permitted to testify in rebuttal; and third, that the state's cross-examination of the appellant's wife, Marilyn Asher, was improperly conducted.

We find that none of the issues asserted by the appellant constitutes reversible error, and we therefore affirm the convictions.

With regard to point one — the search of the vehicle — the

record clearly establishes that the appellant was removed from the scene in a semi-conscious state and that his condition was such that the officers made no attempt to talk to him at that time. The vehicle was removed from the accident site to be placed in the custody of the police or third parties. It is imperative under such circumstances that an inventory search be made to protect the owner's property and to insure against claims of lost, stolen, or vandalized property. The United States Supreme Court has recognized that these interests may be found to outweigh the individual's Fourth Amendment interests requiring a warrant prior to search. *Colorado* v. *Bertine*, 479 U.S. 367 (1987).

The facts here are somewhat analogous to those in *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986), where the appellant was taken from the scene to a hospital following a gun battle with the police. In those circumstances we held that the search of Snell's vehicle was a proper inventory search.

[1] We hold that in this instance the search of the appellant's vehicle was a proper inventory search authorized by A.R.Cr.P. Rule 12.6(b).

The appellant next contends that the state was improperly permitted to call an undisclosed eyewitness in rebuttal.

The state produced evidence that the handgun was found in a "pouch" located at the front of the seat on the driver's side. The appellant called a witness, Jack Prine, to prove that Prine had borrowed the appellant's vehicle and that the guns belonged to the witness and that he had, unknown to the appellant, left the firearms in the appellant's vehicle. The defense carefully examined both prosecution and defense witnesses in an attempt to show that the weapons were not in plain view and that the appellant could not have noticed them.

On rebuttal, the state called Linda Kaiser, an employee of a business located near the scene of the accident. The state had not listed Kaiser as a witness in its response to discovery and did not call her as a witness during the presentation of the prosecution's case-in-chief.

Kaiser testified that she went to the vehicle immediately following the accident in order to see if an ambulance was needed. She saw a handgun in plain view in the seat pouch on the driver's

side. Clearly, this testimony could have been produced by the state in its case-in-chief. However, that fact alone does not preclude its introduction on rebuttal if the testimony serves to refute evidence raised by the defense. *See Birchett* v. *State*, 289 Ark. 16, 708 S.W.2d 625 (1986).

The state proved the weapons were found in the defendant's possession — in his truck. The defense to this proof was a lack of knowledge of the presence of the weapons on the part of the accused. It was then proper rebuttal for the state to counter that defense by showing that the handgun was in plain view.

In *Harper* v. *State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986), the Arkansas Court of Appeals, upholding a felon-in-possession-of-a-firearm conviction, stated: "The evidence is sufficient if it is shown, by either direct or circumstantial evidence, that the appellant had the right to exercise control over the object." In arriving at its decision, the court of appeals properly analogized *Glover* v. *State*, 273 Ark. 376, 619 S.W.2d 629 (1981), and *Cary* v. *State*, 259 Ark. 510, 534 S.W.2d 230 (1976), opinions discussing constructive possession of controlled substances.

[2] Rebuttal witnesses need not be disclosed in response to discovery requests. *Wainwright* v. *State*, 302 Ark. 371, ___ S.W.2d ___ (1990); *Parker* v. *State*, 268 Ark. 441, 597 S.W.2d 586 (1980). The admission of the testimony of Linda Kaiser as a rebuttal witness under the circumstances of this case was not error.

The appellant's third point for reversal concerns the cross-examination of Marilyn Asher, the appellant's wife. This point gives cause for concern, but upon a close examination of the record, we conclude that, though the questioning was improper, there exists no reversible error.

During cross-examination the following exchange occurred:

> Q: Let me ask you this. On October 3, 1988, were you in possession of a number of stolen guns in a fake wall in your bedroom?
>
> A: Not to my knowledge.
>
> Q: You didn't have any knowledge of that wall being there

and those guns behind it?

A: No.

DEFENSE COUNSEL: I am going to object Your Honor and move for a mistrial. . .

THE COURT: Bailiff, would you take the jury out. . . .

Out of the jury's hearing, defense counsel moved again for a mistrial on the grounds that the questions concerned criminal activity that allegedly occurred *after* the incident giving rise to the pending charges against the appellant and, further, that the questioning was inflammatory and prejudicial.

[3] No rule of evidence permits this line of questioning, and the questions addressed to the witness were patently improper. However, to preserve a point for review, a proper objection must be asserted at the first opportunity after the matter to which objection has been made occurs. A.R.C.P. 36.21; *Boone* v. *State*, 282 Ark. 274, 668 S.W.2d 17 (1984). In this instance, that first opportunity occurred when the question was first asked and before it was answered.

[4] Even if the objection had been timely made, under the circumstances we do not believe that the defendant was prejudiced. The witness gave a negative answer to the question. An isolated and impermissible question, though technically error, does not necessarily dictate a reversal. *Bussard* v. *State*, 295 Ark. 72, 747 S.W.2d 71 (1988). *See also Cox* v. *State*, 264 Ark. 608, 573 S.W.2d 906 (1978). We will not reverse for error that does not affect the essential fairness of a trial. A litigant is entitled to a fair trial, not a perfect one. *Scherrer* v. *State*, 294 Ark. 237, 742 S.W.2d 877 (1988).

Affirmed.